

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Applications Filed for the)	DA 11-1019
Transfer of Control of)	IB Docket No. 11-78
Global Crossing Limited to)	
Level 3 Communications, Inc.)	

PAC-WEST’S REPLY COMMENTS

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Pac-West Telecomm, Inc. (“Pac-West”), by and through counsel, files these Reply Comments in response to the Public Notice¹ released June 9, 2011 and the Joint Opposition and Reply Comments (“Opposition”) filed by Level 3 Communications, Inc. (“Level 3”) and Global Crossing Limited (“Global Crossing”) (collectively, the “Applicants”) in this docket. The Applicants’ Opposition does nothing to address Pac-West’s concerns that the combined entity will adopt Level 3’s “worst practices” and use its increased market power to discriminate against smaller LECs, such as Pac-West. Accordingly, the Commission should not approve the merger unless it imposes a robust set of conditions on the merged entity that would prohibit the merged entity from engaging in self-help, as described below.

I. THE COMMISSION CAN, AND SHOULD, ADDRESS LEVEL 3’S SELF-HELP IN THIS DOCKET

The Applicants seek to dismiss Pac-West’s concerns with the proposed merger on the premise that Pac-West’s complaints have industry-wide implications. Opposition at 22-23. This

¹ Public Notice, *Applications Filed for the Transfer of Control of Global Crossing Limited to Level 3 Communications, Inc.*, IB Docket No. 11-78, DA 11-1019, (June 9, 2011). The Commission subsequently granted XO Communications, LLC’s request for an extension of time to file reply comments by an Order dated July 27, 2011.

is precisely backwards. Pac-West objects to the merger because *Level 3* is not abiding by the existing rules and regulations applicable to all Commission-regulated carriers.

Indeed, the precedent the Applicants rely upon to ignore the substance of Pac-West's opening comments is clearly inapposite. In the *AT&T-BellSouth Order*, the Commission refused to address special-access rules common to all carriers in the AT&T/BellSouth merger docket, stating that "[b]y addressing these issues in the context of a rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to *all similarly-situated incumbent LECs*."² In contrast, Pac-West's issue results from the fact that it is not similarly-situated vis-à-vis Level 3 and Global Crossing: the latter compensates Pac-West for the work it performs in handling Global Crossing's toll-free ("8YY") calls as required by the Commission's rules and regulations, while Level 3 refuses to do so. Because Level 3 would be the acquiring company in this proposed merger, its illegal self-help strategy – which the Commission has repeatedly prohibited in the past – will likely be adopted for the combined entity. Accordingly, the harm that Pac-West seeks to prevent from coming to pass can and should be addressed in this docket by requiring the Applicants, should the merger proceed, to adopt Global Crossing's practice of compensating Pac-West for providing the necessary inputs to the Applicant's 8YY service.³

As Pac-West explained in its initial comments, 8YY service is, by definition, a "called party pays" service, whereby interexchange carriers – here, the Applicants – announce to all

² *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662 ¶ 60 ("*AT&T-BellSouth Order*").

³ The fact that Pac-West is proceeding against similar illegal actions by Verizon is therefore beside the point. Verizon is not seeking Commission approval for a merger, and it would be perverse indeed if mimicking Verizon's unlawful behavior would provide Level 3 with less regulatory scrutiny, not more.

other carriers (and their customers) that they will pay all of the access charges associated with bringing those calls to their retail customers.⁴ LECs like Pac-West have no way of avoiding the expenses associated with the Applicant's 8YY traffic, for it is not until Pac-West has their 8YY traffic in its switch and performs the necessary SMS/8YY database query service that it even learns that it is carrying a call for which the Applicants are the "responsible" organizations. And as a common carrier, Pac-West is obligated to carry this traffic and is precluded from recovering charges from the person making the toll-free call – that is exactly what makes the call "toll free."

Recognizing that CLECs such as Pac-West can only recoup the costs associated with 8YY calls from the responsible IXC, the Commission adopted a straightforward regulatory regime with respect to this traffic: as long as a CLEC's rates reasonably approximated the competing ILEC's rates, it could bill tariffed access charges for the work it performs during an 8YY call flow.⁵ The *only* issue the Commission indicated it might need to revisit vis-à-vis the

⁴ The FCC's rules state that, with respect to toll-free numbers, "the toll charges for completed calls are paid by the toll free subscriber." 47 C.F.R. § 52.101(f). *See also Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 at ¶ 11 n.17 (2001) ("*Seventh Report and Order*").

⁵ *See, e.g., Seventh Report & Order*, 16 FCC Rcd. 9923, ¶ 56 ("We will apply the benchmark for both originating and terminating access charges. That is, it will apply to tariffs for both categories of service, including to toll-free, 8YY traffic, and will decline toward the rate of the competing ILEC for each category of service... [W]e decline to do as AT&T suggests and immediately detariff this category of CLEC services above the rate of the competing ILEC."); *id.* at ¶ 104 ("A CLEC provides a closely similar service and uses similar or identical facilities, regardless of whether it provides originating 8YY service, or terminating or originating access service for conventional 1+ calls."); *see also Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108, ¶¶ 64-72 & n.230 (2004) ("*Eighth Report and Order*") (treating all 8YY traffic as access traffic); *id.* at ¶ 72 (rejecting "AT&T's request that we adopt a separate competitive LEC access rate for outbound 8YY access traffic carried over dedicated local access facilities," reasoning that "[w]hen there are no intermediate carriers between the

application of CLECs' access tariffs to IXC's 8YY traffic were any instances of allegedly "illegitimate levels of 8YY traffic coming from a particular end-user," which the Commission said it would address on "a case-by-case basis" *via complaints filed by IXCs*, not by unilateral, illegal self-help by carriers such as Level 3.⁶

By approving the merger without requiring Level 3 to adopt Global Crossing's practices, the Commission in effect would be rewarding Level 3 for its unlawful conduct and punishing Pac-West for abiding by its common carrier duties. The inevitable consequences of validating carrier self-help in this, or any, context can only result in additional unlawful self-help and the further consolidation of the industry. Such a result is the exact opposite of what was intended by the 1996 Act.

CONCLUSION

For all the foregoing reasons, the Commission should deny the applications seeking to transfer control over Global Crossing to Level 3 unless the Applicants commit to abide by the Commission's rules and regulations and compensate CLECs for the work they perform in originating the Applicants' toll-free calls. Of course, if Level 3 would simply pay its bills like Global Crossing and other IXCs, Commission action would not be necessary. Accordingly, Commission approval of the proposed transaction would not be in the public interest unless the Commission first ensures that competitors who actually abide by the Commission's rules can be assured of a level playing field.

competitive LEC and the end-user, the fact that the end-user may provide some portion of the facilities would seem to be irrelevant.").

⁶ Despite this clear direction from the FCC, Level 3 is of the view that, as long as Verizon is leading the way, it's therefore permissible for it to similarly flout the Commission's clear directives.

Respectfully submitted,

/s/

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